See Hong Chen & Sons Sdn Bhd & Ors v Datuk M Kayveas (as Public Officer of People's Progressive Party of Malaysia (PPP))

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-O2(NCC)-1183 OF 2011
ZAINUN ALI, ZAHARAH IBRAHIM AND ANANTHAM KASINATHER JJCA
27 OCTOBER 2011

Trusts and Trustees — Constructive trusts — Whether shares that are not in existence could form a subject matter of an express trusts

On 28 August 2003 the second appellant bought a property at a public auction. The second appellant paid 10% of the purchase price and by way of gentleman agreement the balance of the purchase price would be paid through a loan from Chong Chek Ah, the first defendant of the original action ('the first defendant'). The title of the property reflecting the status of the second appellant and the respondent respectively as the owners was submitted as exhs P18 and P19. The second appellant was incorporated on 10 April 2000 with two subscribed shareholders when the property was purchased and Datuk M Kayveas ('PW1') with B Vijayandran a/l S Balasingam were the shareholders of the second appellant with both the shareholder having one share each. PW1 resigned from his position in the second appellant on 29 January 2001. Later on 17 March 2005 the two others DW 2 and DW3 were appointed as directors and shareholders of the second appellant. Subsequently, after two other directors of the second appellant resigned the first defendant controlled the second appellant. The paid up capital of the second appellant was increased to RM100,000 resulting in the issues of 99,998 new ordinary share of RM1 each for a cash consideration to the first defendant. The respondent's gentleman agreement stated, inter alia: (i) the shares of the second appellant were to be transferred to the first defendant and held by him in trust until repayment of the loan; and (ii) the first defendant and his nominees must not dispose of the shares during the period of the trusts. The PW1 stated the cash payments were made to the first defendant until the balance of the outstanding still owing to the first defendant. By shares sale agreement on 29 November 2005 the first defendant sold the entire share capital of the second appellant consisting 100,000 ordinary shares to the first appellant. The consideration of the sale was RM2.5m which did not reflect the sum stated in memorandum of transfer executed in 2007. The respondent filed a claim seeking, inter alia, a declaration for the sale of share agreement dated 29 November 2005 as null and void. The learned trial judge stated, inter alia, that: (i) the existence of the trust by virtue of the gentlemen's agreement were never denied by the first defendant; (ii) the first defendant, DW2 and DW3 were trustees as PW1 was in possession of the

original title; (iii) the respondent did not pay rentals but paid the assessment since the date of the auction, (iv) the transfer of the shares of the second appellant to the third and fourth appellants was in breach of trusts as the third and fourth appellants were constructive trustees of the shares for the respondent. Hence the appeal by the appellants.

Held, allowing the appeal:

(1) There were no 99,998 shares of the second appellant in existence in 2003 to be transferred to the first defendant pursuant to the gentleman's agreement. The share capital of the second appellant was increased in March 2005 from 2 to 100,000 by the creation of 99,998 new ordinary shares. The entire allotment of 99,998 shares were alloted for a case consideration directly to the first defendant. Further, PW1 who claimed to have negotiated the gentleman's agreement with the first defendant was neither a shareholder nor director of the second appellant at the time of the allotment. Applying the principle of law that 'certainty of subject' is one of the three essentials of a valid trust, the 99,998 shares not being in existence in 2003 could not conceivably be the subject matter of an express trust in favour of the respondent in 2003. Hence, the learned trial judge's finding that the first defendant was the express trustee of the entire 100,000 shares of the second appellant is without foundation. The burden to prove the existence of the express trust was always with the respondent and the appellants have no burden to disapprove facts not proven by the respondent. *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35 (see paras 16–17).

(2) There were no documentary evidence of any loan emanating from the first defendant to the respondent. Taking into consideration the size of the loan and the status of the respondent as a registered society, the absence of any documentary evidence renders the oral evidence of PW1 to be incredible. It is reasonable to expect that the respondent, as a registered political party, to be in possession of documentary evidence of repayment particularly since it was PW1's claim that repayment was in cash and the result of monies raised from its members (see para 18(b)).

(3) No express trust in favour of the respondent came into existence in the year 2003 or in 2005. It follows that the first defendant was not precluded from selling the 100,000 shares registered in his name and his nominees to the first appellant. Apart from the absence of any evidence of knowledge on the part of the third and fourth appellants of the existence of the alleged express trusts it is observed that even if the share sale agreement between the first defendant and the first appellant is void in law, it does not follow that the first appellant holds the 100,000 shares of the second appellant in trust for the respondent. The effect of the share

sale agreement being held to be void is that, the shares revert to the first defendant and not to the respondent (see para 19). A

[Bahasa Malaysia summary

Pada 28 Ogos 2003 perayu kedua membeli satu hartanah melalui lelongan awam. Perayu kedua membayar 10% harga belian dan melalui perjanjian lisan, baki harga belian akan dibayar melalui pinjaman daripada Chong Chek Ah, defendan pertama di dalam tindakan asal ('defendan pertama'). Hak milik hartanah menunjukkan status perayu kedua dan responden masing-masing sebagai pemilik dikemukakan sebagai eksh P18 dan P19. Perayu kedua ditubuhkan pada 10 April 2000 dengan dua pemegang saham apabila hartanah tersebut dibeli dan Datuk M Kayveas ('PW1') dengan B Vijayandran a/l S Balasingam adalah pemegang-pemegang saham perayu kedua dengan kedua-dua pemegang saham memegang satu saham setiap seorang. PW1 meletakkan jawatannya dalam perayu kedua pada 29 Januari 2001. Kemudian pada 17 Mac 2005 dua yang lain DW2 dan DW3 dilantik sebagai pengarah-pengarah dan pemegang saham perayu kedua. Kemudian, selepas dua lagi pengarah perayu kedua meletakkan jawatan, defendan pertama mengawal perayu kedua. Modal berbayar perayu kedua ditambah kepada RM100,000 menyebabkan pengeluaran 99,998 saham biasa baru berharga RM1 setiap satu untuk balasan tunai kepada defendan pertama. Perjanjian lisan responden menyatakan, antara lain: (i) saham-saham perayu kedua akan dipindahkan kepada defendan pertama dan dipegang olehnya dalam amanah sehingga pembayaran balik pinjaman; dan (ii) defendan pertama dan penamanya tidak boleh melupuskan saham-saham tersebut semasa tempoh amanah. PW1 menyatakan bahawa bayaran tunai dibuat kepada defendan pertama sehingga baki tertunggak yang masih dihutang kepada defendan pertama. Melalui perjanjian jualan saham bertarikh 29 November 2005 defendan pertama menjual keseluruhan modal saham perayu kedua mengandungi 100,000 saham biasa kepada perayu pertama. Balasan jualan tersebut adalah RM2.5 juta yang tidak menggambarkan jumlah yang dinyatakan di dalam memorandum pindah milik yang ditandatangani dalam tahun 2007. Responden memfailkan tuntutan memohon, antara lain, deklarasi bahawa perjanjian jualan saham bertarikh 29 November 2005 sebagai batal dan tidak sah. Hakim bicara yang bijaksana menyatakan, antara lain, bahawa: (i) kewujudan amanah melalui perjanjian lisan tidak pernah dinafikan oleh defendan pertama; (ii) defendan pertama, DW2 dan DW3 adalah pemegang-pemegang amanah oleh sebab PW1 mempunyai milikan hak milik asal; (iii) responden tidak membayar sewa tetapi membayar cukai tanah semenjak tarikh lelongan; dan (iv) pemindahan saham perayu kedua kepada perayu ketiga dan keempat adalah pemecahan amanah kerana perayu ketiga dan keempat adalah pemegang amanah konstruktif saham-saham responden. Maka rayuan ini oleh perayu-perayu.

B C D E F G H I

Diputuskan, membenarkan rayuan:

(1) Terdapat 99,998 saham perayu kedua yang wujud dalam tahun 2003

untuk dipindahkan kepada defendan pertama menurut perjanjian lisan tersebut. Modal berbayar perayu kedua ditambah dalam bulan Mac 2005 daripada 2 kepada 100,000 dengan mewujudkan 99,998 saham biasa yang baru. Keseluruhan pengumpukan 99,998 saham diperuntukkan untuk pertimbangan langsung kepada defendan pertama. Selanjutnya, PW1 yang menyatakan telah menguruskan perjanjian mulut dengan defendan pertama bukan pemegang saham atau pengarah perayu kedua pada masa pengumpulan. Mengaplikasikan prinsip undang-undang 'certainty of subject' adalah salah satu daripada tiga perkara penting amanah yang sah, 99,998 saham yang tidak wujud dalam tahun 2003 tidak boleh diterima sebagai subjek perkara amanah langsung (*express trust*) memihak kepada responden dalam 2003. Maka penemuan hakim bicara yang bijaksana bahawa defendan pertama adalah pemegang saham langsung keseluruhan 100,000 saham perayu kedua adalah tidak berasas. Beban membuktikan kewujudan amanah langsung adalah pada responden dan perayu-perayu tidak mempunyai beban untuk menidakkan fakta yang tidak dibuktikan oleh responden. *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35 (lihat perenggan 16–17).

(2) Tidak ada keterangan dokumentar apa-apa pinjaman daripada defendan pertama kepada responden. Mempertimbangkan saiz pinjaman dan status responden sebagai persatuan yang berdaftar, ketiadaan apa-apa keterangan dokumentaryang menjadikan keterangan lisan PW1 tidak boleh dipercayai. Adalah munasabah untuk mengharapkan responden, sebagai parti politik berdaftar, untuk mempunyai milikan keterangan dokumentar pembayaran balik khususnya kerana adalah penyataan PW1 bahawa pembayaran balik adalah dalam bentuk tunai dan daripada wang yang diterima daripada ahli-ahlinya (lihat perenggan 18(b)).

(3) Tidak ada amanah langsung yang memihak kepada responden yang wujud dalam tahun 2003 atau 2005. Berikutan itu defendan pertama tidak dihalang daripada menjual 100,000 saham yang didaftarkan dalam namanya dan wakilnya kepada perayu pertama. Selain daripada ketiadaan keterangan mengenai pengetahuan pada pihak perayu ketiga dan keempat mengenai kewujudan amanah langsung yang didakwa adalah dilihat bahawa walaupun perjanjian jualan saham antara defendan pertama dan perayu pertama tidak sah dari segi undang-undang, tidak tidak bermaksud bahawa perayu pertama memegang 100,000 saham perayu kedua sebagai amanah untuk responden. Kesan perjanjian jualan saham diputuskan sebagai tidak sah adalah, saham-saham tersebut dikembalikan kepada defendan dan bukan kepada responden (lihat perenggan 19).]

Notes

For cases on constructive trusts in general, see 12 *Mallal's Digest* (4th Ed 2011 Reissue) paras 2622–2659.

Cases referred to

Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor [1989] 1 MLJ 35, SC (refd)
Lee Ing Chin @ Lee Teck Send & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)
Milroy v Lord [1861–73] All ER 783, CA (refd)
Perman Sdn Bhd & Ors v European Commodities Sdn Bhd & Anor [2006] 1 MLJ 97; [2005] 4 CLJ 750, CA (refd)
Yeong Ah Chee v Lee Chong Hai & Anor and Other Appeals [1994] 2 MLJ 614, SC (refd)

Legislation referred to

Companies Act 1965 Form 24
National Land Code Form 16F

Appeal from: Suit No D–22NCC–1913 of 2010 (High Court, Kuala Lumpur)

Joseph Yeo (Paari Perumal with him) (Joseph Yeo) for the appellant.
Muralee Menon (V Mugunthan with him) (Jaafar & Menon) for the respondent.

Anantham Kasinather JCA (delivering judgment of the court):

BACKGROUND FACTS

[1] On 28 August 2003, the second appellant purchased a property bearing the particulars Grant No 27024 Lot 522, Section 69 Bandar Kuala Lumpur, Wilayah Persekutuan ('the said property') at a public auction at the price of RM2,673,000 (see p 529 of *bahagian* C *jilid* 2). The second appellant paid 10% of the purchase price from its own funds and the balance through a loan from Chong Chek Ah, the first defendant in the original action ('the first defendant'). The cheque for the balance sum of RM2,405,700 was forwarded to the 'Penolong Kanan Pendaftar' by the firm of solicitors Messrs Rajah Lau and Associates ('the said solicitors') together with their letter of 26 December 2003 (see p 550 of *bahagian* C *jilid* 2). The title to the said property reflecting the status of the second appellant as the owner of the said property was produced in court by way of two different exhibits. The title produced by the respondent was marked as exh P18 and that by the appellants as D19.

[2] The second appellant was incorporated on 10 April 2000. At the time of incorporation, it had a paid up capital of RM2 and the subscriber shareholders of the said company were Datuk M Kayveas and B Vijayandran a/l S Balasingam (see p 491 of *bahagian* C *jilid* 1). The aforesaid two shareholders remained the only shareholders of the second appellants at the time of the purchase of the said property in 2003. The directors of the second appellant in

2003 were Selva Mohan a/l Suppiah and YB Senator Dato Maglin a/l Dennis D-cruz (see p 459 of *bahagian* C *jilid* 1). Datuk Kayveas ('PW1') having resigned his position as a director of the company on 29 January 2001 (see p 459 of *bahagian* C *jilid* 1). There was a significant change in the ownership and management of the second appellant in March 2005. On 17 March 2005, Periyanayagee a/p Kandian ('DW3') and Hung Beng Guan ('DW2') were appointed directors and shareholders of the second appellants (see p 476 of *bahagian* C *jilid* 1). Selva Mohan a/l Suppiah and YB Senator Dato Maglin a/l Dennis D-cruz resigned their positions as directors on 8 May 2005 (see p 463 of *bahagian* C *jilid* 1). Accordingly, the first defendant controlled the whole of the share capital and management of the second appellant effective 8 May 2005.

[3] At an extraordinary general meeting of the members of the second appellant convened on 17 March 2005, the members including YB Senator Dato Maglin a/l Dennis D-cruz caused to be passed a resolution to increase the paid up capital of the second appellant from RM2 to RM100,000 (see p 473 of *bahagian* C *jilid* 1). This resulted in the issuance of 99,998 new ordinary shares of RM1 each for a cash consideration to the first defendant (see p 475 of *bahagian* C *jilid* 1). With this allotment, the first defendant became the legal owner of 99,998 shares and the beneficial owner of all the ordinary shares of the second appellant.

[4] The respondent is a political party of which PW1 is the president. PW1 is also the registered public officer of the respondent. PW1 was the principal witness who gave evidence on behalf of the respondent. According to PW1, following the purchase of the said property by the second appellant, he sought and obtained a loan from the first defendant to enable the second appellant to complete the purchase of the said property. The loan amount of RM2,405,700 was received by the second appellant on the basis of a gentleman's agreement between him and the first defendant. The terms of the oral gentlemen agreement concluded sometime in the year 2003 (see paras 20, 21 and 22 of S/C — at p 79–82 of AR) may be summarised to be as follows:

(a) the first defendant was to advance to the second appellant the sum of RM2,405,700 on or before end of 2003;

(b) the respondent was to repay the loan as and when it was able to do so and in such amounts as it could afford;

(c) that the shares of the second appellant were to be transferred to the first defendant and held by him in trust until the repayment of the loan by the respondent (see para 20(c) of the respondent's statement of claim at p 80 of AR);

(d) the first defendant and his nominees were not permitted to sell, dispose, transfer or in any way deal with the shares of the second appellant during the period of the trust; and

(e) that the original document of title of the said property was to be retained by the respondent.

[5] According to PW1, pursuant to the oral agreement the first defendant provided the banker's cheque dated 26 December 2003 in the sum of RM2,405,700 thereby enabling the second appellant to complete the purchase of the said property. The said solicitors forwarded the banker's cheque to the Penolong Kanan Pendaftar Kuala Lumpur High Court as payment of the balance purchase price together with Form 16F ('National Land Code') to be issued by the Kuala Lumpur High Court. The title to the said property was thereupon transferred to the name of the second appellant. According to PW1, the respondent thereafter paid the assessment and quit rent for the said property but no rentals were paid to the second appellant.

[6] According to PW1, the respondents had from time to time made cash payments to the first defendant so as to reduce the outstanding sum due to him from RM2,405,700 to RM 605,700. The respondent admits to still owing this sum to the first defendant.

[7] By a share sale agreement dated 29 November 2005, the first defendant sold the entire share capital of the second appellant consisting of 100,000 ordinary shares to the first appellant. The share sale agreement stipulated the consideration for the sale to be RM2.5m although the memorandum of transfer effecting the transfer of the shares stipulated the consideration to be RM100,000 only. The memorandum of transfer was executed in the year 2007 although the agreement was executed on 29 November 2005.

[8] The respondent filed this claim on 14 October 2010 seeking, inter alia, a declaration for the share sale agreement of 29 November 2005 to be declared invalid.

[9] Following the trial of the action, the learned High Court judge upheld the claim of the respondents. The judgment of the learned trial judge can be summarised to be premised on the following findings:

First finding

(a) That the first defendant is a trustee for the respondent of the 100,000 shares of the second appellant. This finding was primarily based on the failure of the first defendant to attend court. His Lordship concluded that since the evidence of PW1 concerning the terms of the gentleman's

agreement including the existence of the trust were never denied by the first defendant, the trust came into existence in 2003 (see para 22 of the judgment of the court at pp 39–40 AR);

Second finding

(b) The learned trial judge relied on the following additional facts as affording evidence of the first defendant and DW2 and DW3 being trustees:

(i) that the evidence of PW1 – PW4 was consistent with the respondent's pleaded case, the agreed issues and the contemporaneous documentary evidence and consequently wholly reliable;

(ii) the absence of any evidence that the first defendant paid for the shares allotted to him;

(iii) the fact that PW1 was in possession of the original title to the said property from the date of the auction;

(iv) the fact that the respondent did not pay rentals and paid the assessment since the date of the auction; and

(v) the fact that the said solicitors acted for the respondent during the auction as the purchasers of the said property through the second appellant.

Third finding

(c) Since the shares of the second appellant upon transfer were held by the first defendant and DW2 and DW3 as trustees for the respondent and since they were prohibited by gentleman's agreement from transferring these shares, the transfer by them of these shares to the third and fourth appellants was in breach of trust. The third and fourth appellants were consequently constructive trustees of these shares for the respondent (see para 26 of the judgment of the court at p 45 AR).

DECISION OF THE COURT

First finding

[10] Before we proceed to consider the first finding of the learned judge, it would be useful to examine the different forms and essentials of a valid trust. There are four different forms of trust. These being express trust, implied trust, resulting trust and constructive trust. The three essentials of a valid trust are:

(a) certainty of words;

(b) certainty of subject; and

(c) certainty of object

(see *Yeong Ah Chee v Lee Chong Hai & Anor and Other Appeals* [1994] 2 MLJ 614 at p 624).

[11] The distinction between an express trust and a constructive trust is relevant having regard to the respondent's pleaded case and the evidence of its principal witness PW1. An express trust has been defined to be one:

(a) created consciously by the absolute owner of the property either declaring himself to be trustee of the property for identified beneficiaries, or declaring that some other person is to be trustee of the property for identified beneficiaries and then transferring legal title in the trust property to those trustees (see *The Law of Trusts* by Geraint Thomas and Alastair Hudson (2nd Ed), at p 19). By contrast, a constructive trust is imposed by operation of law, that is to say, it overrides the intention of the parties (see *Perman Sdn Bhd & Ors v European Commodities Sdn Bhd & Anor* [2006] 1 MLJ 97; [2005] 4 CLJ 750). The authors of this book describe a constructive trust as one which exemplifies equity's role as a means of ensuring good conscience. In other words, when a person deals with the property in a way which is deemed to be unconscionable, a court of equity will construe the person to be a trustee of that property (see p 20).

[12] A careful examination of the respondent's pleaded case and Q&A 26 of the witness statement of PW1 will reveal that the trust alleged by PW1 was that the first defendant was a trustee of the respondent pursuant to the terms of the gentleman's agreement reached between PW1 and the first defendant. In other words, based on the definition of an express trust and a constructive trust, it is evident that the respondent's claim was that an express trust came into existence in 2003 as a result of the intention of the parties contained in the gentleman's agreement of 2003. This is evident from para 22 of the statement of claim which reads 'based on the gentleman's agreement between the Plaintiff and the 1st Defendant, the following took place' i.e the release by the First Defendant of his cheque for the balance purchase price'.

[13] In 2003, PW1 and B Vijayandran a/l S Balasingam were the only registered shareholders of the second appellant. Following the definition of an express trust, it is reasonable therefore to examine whether the first defendant declared himself to be a trustee and, if so, for whom. However, in order for the first defendant to declare himself a trustee, the aforesaid two shareholders ought to have transferred their shares to him. This is consistent with the rule of equity that a settlor must vest the trust property (subject) in the trustee completely for the trust to come into existence (see *Milroy v Lord* [1861-73] All

ER 783). However, on the facts of this case, the transfer when it took place was only in 2005 (see the evidence of DW2 at p 307 of *bahagian* B *jilid* 2). Furthermore, the transfer was not in favour of the first defendant but Hung Beng Guan ('DW2') and Periyanayagee a/p Kandiah ('DW1'). Both these shareholders denied being trustees for the respondent. Indeed, their evidence was that they were employees of the first defendant; required by him to be the shareholders and directors of the second appellant and that they acted solely on the directions of the first defendant.

[14] It is the respondent's case that DW2 and DW3 are the nominees of the first defendant. Even if knowledge that PW1 and B Vijayandran a/l S Balasingam were holding their two shares in trust for the Respondent can be imputed to them, there was no declaration by either of them or the first defendant that they were holding these two shares in trust for the respondent. On the contrary the evidence of DW2 and DW3 was that they were holding in trust for the first defendant. Quite apart from the absence of any declaration of trust by them, the fact of the matter is that the two shares were only transferred to DW2 and DW3 in 2005. Accordingly, irrespective of the status of DW2 and DW3, no express trust could have come into existence in 2003.

[15] Furthermore, the respondent's pleaded case of trust involved not just these two shares but also the entire 100,000 paid up shares of the second appellant. That the respondent was claiming a trust in its favour over the whole 100,000 shares is evident from the fact that the primarily relief sought is for a declaration that the shares sale agreement between the first defendant and the first appellant is null and void. Quite clearly in law, the respondent can only seek relief against the first, third and fourth appellants as constructive trustees if the respondent was the beneficial owner of the shares of the second appellant in the first place. For the respondent, in turn, to be the beneficial owner of these shares, it had to prove the existence of the express trust in its favour. The respondent sought to do this by claiming that the first defendant held the 100,000 shares of the second appellant in trust for it.

[16] In truth, there were no 99,998 shares of the second appellant in existence in 2003 to be transferred to the first defendant pursuant to the gentleman's agreement. The share capital of the second appellant was increased in March 2005 from 2 to 100,000 by the creation of 99,998.00 new ordinary shares. The entire allotment of 99,998 shares were allotted for a cash consideration directly to the first defendant. Furthermore, PW1 who claimed to have negotiated the gentleman's agreement with the first defendant was neither a shareholder nor director of the second appellant at the time of the allotment. PW4, the respondent's representative in the second appellant, approved the resolution for this allotment. Applying the principle of law that 'certainty of subject' is one of the three essentials of a valid trust, the 99,998

shares not being in existence in 2003 could not conceivably be the subject matter of an express trust in favour of the respondent in 2003. Once it is acknowledged that the subject matter of the trust was not even in existence in 2003 and created by way of an allotment, then, with respect, the learned trial judge's finding that the first defendant was the express trustee of the entire 100,000 shares of the second appellant is clearly without foundation.

[17] In this respect, we observe that the learned trial judge's finding of the express trust is based primarily on the failure of the appellants to ensure that the first defendant gave evidence in their favour. His Lordship had this to say concerning the absence of the first defendant:

> The fourth to seventh defendants had full knowledge that the first defendant had not entered appearance. Despite such knowledge they have not subpoenaed the first defendant or ensure that the first defendant gives evidence in support of their defence … The failure of the first defendant to enter defence and give evidence to challenge the plaintiff's case is fatal to the defendants.

With respect, we are unable to agree with the adverse inference drawn by the learned trial judge against the appellants arising from the non appearance of the first defendant. We agree with counsel for the appellant that the burden to prove the existence of the express trust was always with the respondent and the appellants have no burden to disprove facts not proven by the respondent (see *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35).

Second finding

[18]

(a) The reason advanced by the learned trial judge for preferring the evidence of PW1–PW4 to that of the appellants was that their evidence was consistent with their pleaded case, the agreed issues and the contemporaneous documentary evidence. With respect, this is far from correct. First, the respondent's trust claim was essentially based on the terms of the gentleman's agreement. The respondent's version of the gentleman's agreement was the first defendant was to hold the shares of the second appellant in trust for the defendant. Yet, neither PW1 nor B Vijayandran a/l S Balasingam transferred their shares to the first defendant in 2003. The learned trial judge whilst holding the transfer to have created the express trust, made no reference to the fact that neither PW1 nor B Vijayandran a/l S Balasingam transferred their shares in the second appellant to the first defendant in 2003, in accordance with the respondent's pleaded case. Secondly, since it is an undisputed fact that the two shares were not transferred in 2003, the absence of the first defendant as a witness did not detract from the fact that the two shares were not

vested in him in the first place. Thirdly, in para 22(v) of the statement of claim, the respondent averred that the 100,000 shares were transferred to the first defendant and DW2 and DW3 in trust by the respondent through the respondent's representative who were holding the shares in trust for the respondent at the time (see p 82 of AR). This averment is materially incorrect in a number of aspects.

(i) First, there were no 100,000 shares in the year 2003;

(ii) secondly, the 99,998 shares were never transferred to the first defendant or DW2 and DW3 because these shares were allotted to the first defendant;

(iii) thirdly, to the extent that these shares were allotted, there is no question of these shares being held in trust by the respondent's representatives for the respondent prior allotment;

(iv) fourthly, although it is true that the remaining earlier two shares were transferred to DW2 and DW3 in 2005, there is no evidence that the shares were transferred by PW1 and B Vijayandran a/l S Balasingam to be held in trust by them. Indeed, it was never suggested to the third defendant (DW3) during cross examination that the share transferred to him was to be held by him in trust for the respondent. In the case of the second defendant (DW2), he denied holding the shares in trust for the respondent (see p 305 of *bahagian* B *jilid* 2); and

(v) fifthly, since both the transfer and the allotment took place in 2005, the reference to the words 'at the time' in para 22(vi) of the statement of claim is materially incorrect since the intention of the parties as provided in the gentleman's agreement was for the transfer to be effected in 2003. This follows from the fact that the first defendant was required and did advance the monies before the end of 2003, if PW1's version of the loan is to be believed (see cl (a) of para 20 (iii)).

Accordingly, the evidence of PW1 as regards the 99,998 shares and the status of the first defendant, DW2 and DW3 being trustees in 2003 is materially inconsistent with the respondent's pleaded case and the documentary evidence, contrary to the learned trial judge's finding.

(b) As regards consideration, the allotment of the 99,998 shares was clearly for cash consideration (see p 471 of *bahagian* C *jilid* 1). Since PW4 himself certified this payment at p 472 of *bahagian* C *jilid* 1, he was hard pressed to deny this to be the case in cross examination (see line 472 p 276 of *bahagian* B *jilid* 2). With respect, the consideration must have been paid as otherwise the secretary of the company would not have completed and filed Form 24 with the company registry reflecting the increase in the paid up capital of the second appellant from RM2 to

RM100,000. In our opinion, it is more likely that the consideration for this allotment was the satisfaction of the outstanding loan due from the second appellant to the first defendant. We are fortified in making this finding as PW2, the treasurer of the respondent who conceded as much during examination-in-chief by his own counsel (see line 583 p 284 of *bahagian* B *jilid* 2). Counsel for the respondent conscious that the more important consideration was to prove that the allotted shares formed part of the express trust, then, volunteered the evidence to PW2 that these shares were also subject to the express trust. This prompted counsel for the appellant to object to the leading question (see line 588 p 285 of *bahagian* B *jilid* 2). In our opinion, the fact that there is no reference to the shares allotted forming part of the express trust in PW2's witness statement suggests that his answer in court was an afterthought. The respondent in alleging the absence of consideration claimed through PW1 that the loan from the first defendant was not to the second appellant but to the respondent (see para 20(iii)(b)). Secondly, the respondent claimed to have settled the loan save for the sum RM605,000. With respect, there is no documentary evidence of any loan emanating from the first defendant to the respondent. Having regard to the size of the loan and the status of the respondent as a registered society, the absence of any documentary evidence renders the oral evidence of PW1 to be incredible. Secondly, there is no evidence of any repayment and, again, it is reasonable for this court to expect the respondent as a registered political party to be in possession of documentary evidence of repayment particularly since it is PW1's claim that repayment was in cash and the result of monies raised from members (see Q&A 33 of PW1 at p 207 of *bahagian* C). It is quite simply incredible to expect this court to believe that member's contributions amounting to RM1.8m were paid in cash to a lender without a shred of documentary evidence. Thirdly, if the loan was to the respondent and had been substantially repaid, why transfer the two shares in 2005 when no transfers were effected in 2003 after PW1 had agreed to the transfer pursuant to the gentleman's agreement. In our opinion, the irresistible inference is that the respondent in exchange for the loan being treated as extinguished, relinquished any interest it had in the second appellant in 2005. Hence, the replacement of the respondent's representatives on the board of directors of the second appellant by nominees of the first defendant. We are fortified in drawing this inference by the contents of the respondent's solicitors letter of 24 July 2008 and 19 September 2008 wherein the respondent did not raise the existence of the express trust in its favour to refute the first appellant's demand that it surrender vacant possession of the said property. The contents of these two letters are dealt with more extensively later in this judgment.

(c) According to PW1, P18 is the original title and the respondent has been

in possession of this title since it was issued (see Q&A 47 and 48 of PW1's witness statement). This cannot conceivably be true. First, P18 bearing No 65301 was only issued and registered on 9 October 2007 (see p 661 of *bahagian* C *jilid* 3). D19, on the other hand, was first registered on 16 February 1996 and is an original extraction issued on 14 July 2004 (see p 665 of *bahagian* C *jilid* 3). As submitted by counsel for the appellant, it is evident from an examination of exh D19 that the same is the predecessor of title 65301. Since P18 was issued and registered in 2007, it could not have been in the possession of the respondent from 2003 as claimed by PW1. Secondly, the learned trial judge's finding that the issuance of the new title ('P18') was the result of the respondent having applied for one arising from the loss of the original title is inconsistent with the evidence of the respondent's own witness PW4. YB Senator Dato Maglin a/l Dennis D-cruz (PW 4) testified that as he could not get the title to the property from EON Bank (formerly known as 'Oriential Finance Berhad') he had written to the land office and secured exh P18 from the land office. Thirdly, the learned trial judge observed in his judgment that 'there was also no rational explanation how they (referring to the first appellant) secured the title marked as exh D19 and why they have lodged the caveat on the said property'. With respect, this observation of His Lordship totally disregards the evidence of DW1 that exh D19 was obtained by him from the first defendant following the execution of the share sale agreement in 2005 (see p 391 of *bahagian* B *jilid* 2). Finally, PW1 testified that the respondent had no reason to enter a caveat on the said property until 14 October 2010 because there was no threat of any kind to its purported beneficial interest in the said property prior thereto. This was a strange assertion to make since exh P18 which PW1 claimed to be in his possession since 2003 included reference to the private caveat lodged by the first appellant on 15 December 2005. Accordingly, based on PW1's own evidence, the respondent ought to have been aware of the caveat from as early as 2005 and he ought to have applied to remove the same and not have waited until 14 October 2010. PW1's evidence was demonstrably contrary to the documentary evidence. Furthermore, the history of these two exhibits also reflects poorly on the claim of counsel for the respondent during the cross-examination of DW1 that exh D19 is a fraudulent document obtained fraudulently by DW1 from the land office. Having regard to these facts and the share sale agreement of 2005, the learned trial judge was clearly in error in His Lordship's observation.

(d) As regards the non-payment of rentals, in our judgment, there is a completely plausible reason why the rentals were not paid by the respondent to the second appellant between 2003 and 2005. That is this. The only shareholders and directors of the second appellant between 2003 and 2005 were PW1 and B Vijayandran a/l S Balasingam.

According to them, they were holding the shares of the second appellant in trust for the respondent. Since PW1 and B Vijayandran a/l S Balasingam controlled the second appellant between 2003 and 2005, it was entirely up to the two of them to determine whether rentals were to be paid to the second appellant. The obligation to pay rentals altered materially upon the first defendant taking over control of the second appellant in 2005. There is the evidence of DW2 and DW3 that upon the first defendant becoming the registered owner of the 100,000 shares together with them, they demanded the payment of rentals by the respondent (see the evidence of DW2 at p 314 of *bahagian* B *jilid* 2). Furthermore, DW4 during examination by counsel for the appellants confirmed that through letters dated 24 July 2008 (see p 650 of *bahagian* C *jilid* 3) and letter dated 19 September 2008 (see p 652 of *bahagian* C *jilid* 3), the second appellant had claimed for rentals owing and outstanding by all the tenants of the said property including the respondent. In other words, upon the first defendant becoming the controlling shareholder of the second appellant, demands were made for rentals from the respondent and such demands were never met with the response that the respondent was the beneficial owner of the said property. Instead what we have are letters dated 24 July 2008 (see p 555 of *bahagian* C *jilid* 2) alleging that the first defendant was holding the shares of the second appellant temporarily and the respondent's solicitors letter of 19 September 2008 (see p 563 of *bahagian* C *jilid* 2) that 'we had been informed by the public officer of the People Progressive Party of Malaysia that the negotiating to purchase the said premises from your client has been on going and soon to be finalized'. With respect, the contents of exhs 555 and 563 amount to an express admission on the part of the respondent through their solicitor agents of the absence of any express trust in favour of the respondent, contrary to the claim of PW1 that the respondent was the beneficial owner of the said property (see p 260 of *bahagian* B *jilid* 2). The significance of this admission cannot be overemphasised since PW1 was the public officer in question at the material time.

(e) As regards the status of the law firm of Messrs Rajah Lau and Associates ie the said solicitor, His Lordship concluded that the firm 'in the ordinary course of conveyancing must have acted for the Plaintiff during the auction' (see line 15 p 45 of *bahagian* A *jilid* 1). The learned judge appears to have relied on the letter from the said solicitor dated 26 December 2003 (see p 550 of *bahagian* C *jilid* 2) when forwarding the balance of the purchase price and Form 16F to the High Court for this conclusion. With respect, this conclusion is not warranted by the contents of this letter. The firm expressly held themselves out as writing the letter on behalf of 'Pembeli' ie the second appellant. Accordingly, the learned judge erred, in our opinion, in drawing an adverse inference against the

appellants arising from their failure to produce Mr Lau Ken Fai as a witness since it was the respondent who was disputing the contents of the letter. Since there is no evidence that the said solicitors were notified that the first defendant was holding the shares of the second appellant in trust, in our opinion, the said solicitors cannot be faulted for acting for the first defendant when he resolved to sell the shares of the second appellant to the first appellant. For this reason, we see no merit in the respondent's claim that the said solicitors conspired with the appellants to defeat the respondent's rights as the alleged beneficial shareholders of the said shares.

Third finding

[19] The learned judge's finding holding the first, third and fourth appellants to be constructive trustees is premised on the first defendant being an express trustee of the shares of the second appellant for the respondent. Accordingly, arising from our finding that no express trust in favour of the respondent came into existence in the year 2003 or for that matter in the year 2005, it follows that the first defendant was not precluded from selling the 100,000 shares registered in his name and his nominees to the first appellant. In this respect, quite apart from the absence of any evidence of knowledge on the part of the third and fourth appellants of the existence of the alleged express trust, we wish to observe that even if the share sale agreement between the first defendant and the first appellant is void in law, it does not follow that the first appellant is holding the 100,000 shares of the second appellant in trust for the respondent. We opine to this effect because, in law, the effect of the share sale agreement being held to be void is that the shares revert to the first defendant and not to the respondent. This follows from PW1's own evidence that under the gentleman's agreement, the first defendant was obliged to transfer the shares to the respondent only upon repayment of the outstanding loan in full. It is an undisputed fact that there is an outstanding amount of RM605,000 still due and owing to the first defendant according to the PW1's version of the present status of the loan. Accordingly, even if the learned judge was right in holding the share sale agreement to be null and void, there is no justification in law for the granting of the consequential relief sought and obtained by the respondent.

PRINCIPLES OF APPELLATE INTERVENTION

[20] An appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. Additionally, appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. JCA Gopal Sri Ram (as he then was) in the case of *Lee Ing Chin @ Lee Teck Send & Ors v Gan Yook Chin &*

Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19 explained what judicial appreciation of the evidence involved, in this manner:

> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighting and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness ay have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal.

[21] In our opinion, the learned trial judge fell into error both in the application of legal principles, as well, as in the judicial appreciation of the evidence. In summary, the errors committed by the learned judge included the following:

(a) finding the existence of the express trust in 2003 by way of transfer to the first defendant of the only two shares of the second appellant to the first defendant when no such transfer took place;

(b) finding the existence of an express trust in 2003 by way of transfer of 99,998 shares of the second appellant when these shares only came into existence in 2005 and by way of an allotment by the second appellant directly to the first defendant;

(c) disregarding the absence of any evidence that the 99,998 shares forming the subject matter of the allotment formed part of the express trust alleged by PW1. Indeed, PW1 was neither a shareholder nor director of the second appellant at the time of allotment. Furthermore, PW4 who was the respondent's representative in the second appellant at the material time, was a party to the resolution approving the allotment. PW4's and PW2's witness statements are bereft of any claim of the existence of the express trust in respect of these shares;

(d) to the extent that the 99,998 shares were not in existence at the time of the alleged gentleman's agreement, the respondent failed to establish one of the essentials of a valid trust;

(e) the learned judge's acceptance of the evidence of PW1 as regards he being in possession of P18 from 2003 reflected a glaring lack of judicial appreciation of the evidence since it was demonstrably clear that P18 was obtained in 2007 by PW4;

(f) the learned trial judge, in our opinion, for the reasons given earlier in this

judgment erroneously concluded that the appellant's failure to call the first defendant as a witness absolved the respondent of the burden of proving their claim to the existence of the express trust. Similarly, His Lordship erroneously drew an adverse inference arising from the respondent's failure to call Mr Lau; and

(g) the learned trial judge in granting the consequential relief prayed for by the respondent erroneously disregarded PW1's own admission that the loan was still outstanding.

[22] As we are satisfied that the learned High Court judge arrived at the wrong conclusion by reason of having acted upon the wrong principles of law and upon a misapprehension of the evidence, we allowed the appeal and set aside the order of the High Court. We ordered the respondent to pay costs of RM75,000 to the appellant in respect of this appeal. We ordered the respondent to pay costs of RM100,000 to the appellant in respect of the High Court proceedings. It was ordered that the deposit be refunded to the apellant.

Appeal allowed.

Reported by Masrifah Ravendran